Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-....79-338

WILLIAM J. CASKEY, PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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The petitioner William J. Caskey respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of South Carolina entered in this proceeding on June 11, 1979.

Opinions Below

The opinion of the South Carolina Supreme Court, not yet reported, appears in Appendix A hereto. The Order of the state trial court, reversed on appeal, is unreported and appears in Appendix B.

Jurisdiction

The judgment of the Supreme Court of South Carolina was entered on June 11, 1979. A timely petition for rehearing was denied on July 19, 1979, and this petition for *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3).

Questions Presented

1. Whether a new trial on the ground of newly discovered evidence may be withheld because the newly discovered evidence is solely impeaching in nature, where the prosecution failed to disclose the impeaching evidence in response to a specific pretrial request?

2. Given the finding that an acquittal probably would have resulted from newly discovered evidence which had been requested by the defense but withheld by the prosecution, whether a new trial may nonetheless be denied because the newly discovered evidence is characterized as cumulative?

3. Whether the newly discovered evidence—namely, that the local prosecutor had promised to discuss with the office of the State Attorney General, as final arbiter, his proposal to drop the charges against the key witness—is merely cumulative to evidence that the local prosecutor had earlier expressed a lack of personal interest in bringing the witness to trial?

Constitutional Provisions Involved

The Constitution of the United States, Amendment XIV, Section 1, provides: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

Statement of the Case

Following his involvement in an automobile accident, one Virgil Kilgoar was charged with driving under the influence, second offense. Kilgoar retained the petitioner herein, an attorney, to represent him and paid a fee to petitioner.

Petitioner was subsequently charged with the crimes of conspiracy and obstruction of justice on the theory that

he had used part of the attorney fee received from Kilgoar to bribe a magistrate.

Prior to petitioner's trial for conspiracy and obstruction, he requested the prosecutor to disclose any promises or hope of leniency given to the State's witnesses, "including . . . assistance or favorable treatment with respect to any criminal . . . dispute with the State . . ." The prosecutor responded that the only relevant statement made by him to his chief witness, Kilgoar, was that he had no interest personally in prosecuting Kilgoar. [Tr. 733.]

Shortly after the witness Kilgoar had given testimony at petitioner's trial which tended to incriminate the petitioner, the prosecutor informed Kilgoar privately that he probably would not be prosecuted, but that the matter would have to be discussed by the prosecutor with the office of the State Attorney General for a final decision at a later date.

Meanwhile, the jury found itself unable to reach a verdict on the charges against the petitioner, and a mistrial was declared.

Prior to his re-trial, three months later, petitioner again requested disclosure of any hope of assistance or favorable treatment in a criminal matter given to the witness Kilgoar or others. The prosecutor made no disclosure. Kilgoar thereafter testified at the re-trial that he had been promised nothing for his testimony; that for all he knew he might still be prosecuted; and that his testimony was solely motivated by a desire to tell the truth. (Kilgoar had been waiting the three months since his talk with the prosecutor, without being told whether the prosecutor had carried out his promise or not.) Following an *Allen* charge to the jury after inconclusive deliberations, the jury returned a verdict of guilty against the petitioner.

Two months after the trial, the prosecutor acknowledged to petitioner's counsel what had been said to the witness Kilgoar.

The trial court granted petitioner's motion for a new trial based upon this after-discovered evidence. The trial court held that two of South Carolina's traditional restrictions upon such a motion [1] were inapplicable when evidence relating to the credibility of a key witness had been withheld despite a specific pretrial request for disclosure. The trial court held that a new trial is required by due process if a reasonable likelihood exists that the withheld evidence might have altered the verdict.

The South Carolina Supreme Court reversed the grant of a new trial and applied the traditional test of a motion for new trial based upon after-discovered evidence (identical to the test generally applied in the federal courts under Rule 33, Fed. R. Crim. Proc.). Noting that the newly discovered evidence went only to the credibility of the witness Kilgoar, the Court held that such evidence could not form the basis for a new trial under the traditional South Carolina rule. The Court further held that the prosecutor's promise to discuss Kilgoar's prosecution favorably with the State Attorney General's office, where the final decision would lie, was "virtually identical" to the prosecutor's earlier statement that **he personally** was not interested in bringing Kilgoar to trial. Thus, the after-discovered promise was characterized as cumulative, and the grant of a new trial was reversed.

[1] (a) Evidence relating to the "mere credibility" of a witness is insufficient to warrant a new trial. (b) The movant must show that the new evidence would have resulted in acquittal. *State v. Fowler*, 264 S. C. 149, 213 S. E. 2d 447.

Reasons for Granting the Writ

I. The South Carolina Supreme Court's Decision is in Conflict With the Decisions of the Courts of Appeals in Cases Involving Solely Impeaching Evidence.

The traditional test of a motion for a new trial upon newly discovered evidence in South Carolina is the same as that applied in most of the Federal Circuits under Fed. R. Crim. Proc. 33. Newly discovered evidence does not warrant a new trial if its sole relevance is to impeach the credibility of a witness, or if the evidence is cumulative. *State v. Fowler,* 264 S. C. 149, 213 S. E. 2d 447.

In previous cases this Court has dealt with newly discovered impeaching evidence as a constitutional ground for a new trial, but only where the prosecution knew or should have known that the afterwards-impeached testimony was false. *Napue v. Illinois,* 360 U. S. 264; *Giglio v. United States,* 405 U. S. 150. Because these cases involved a corruption of the truth-seeking process by the use of testimony either actually or constructively known to be false, the convictions were tainted even though the false evidence related solely to the credibility of a witness and not directly to the guilt or innocence of the accused.

The element of knowing use of false testimony was absent in *Brady v. Maryland,* 373 U. S. 83, and *Agurs v. United States,* 427 U. S. 97, both of which cases involved the prosecutor's failure to disclose evidence material to guilt or to punishment, not credibility. As yet, the Court has not answered the question of whether the rule of the *Brady* decision extends with full force to specifically requested but undisclosed evidence bearing solely upon the credibility of a witness and not relating directly to the facts of the alleged crime or to the guilt or innocence of the accused.

The trial court herein felt compelled to grant a new trial because of the prosecutor's failure to disclose solely impeaching evidence upon request, even though there had been no knowing use of perjured testimony by the prosecutor. The South Carolina Supreme Court reversed and applied its traditional principle against new trials upon after-discovered evidence which is solely impeaching.

In *Garrison v. Maggio,* 540 F. 2d 1271 (1976), the Fifth Circuit held that the stringent materiality standard of Fed. R. Crim. Proc. 33 applies to a motion for a new trial based upon the nondisclosure of unrequested purely impeaching evidence: the movant must show that the new evidence probably would have resulted in acquittal. The South Carolina Supreme Court has carried that progression a step further in the instant case and has held that purely impeaching evidence cannot be the ground of a new trial, even though the impeaching evidence was specifically requested by the defense and was not disclosed. In its Brief to the South Carolina Supreme Court, the State distinguished the facts in *Giglio v. United States,* 405 U. S. 150, which likewise dealt with undisclosed impeaching evidence, by reference to the known use of false testimony in that case. Apparently the court below agreed that the absence of prosecutorial misconduct in the instant case was controlling.

A number of cases have been decided in the Courts of Appeals and in state appellate courts where the nondisclosure of impeaching evidence was held to require a new trial, despite the absence of any element of known use of perjured testimony. Among these have been *United States v. McCrane,* 547 F. 2d 204 (3rd Cir. 1976); *Boone v. Paderick,* 541 F. 2d 447 (4th Cir. 1976); *United States v. Harris,* 462 F. 2d 1033 (10th Cir. 1972); *Price v. State,* 141 Ga. App. 335, 233 S. E. 2d 462 (1977). The instant case appears to

be the first to reject outright the possibility that a new trial could be constitutionally compelled where requested but undisclosed evidence is solely impeaching in nature. Unless this Court addresses the significance of purely impeaching evidence, further departure from the tests announced in *United States v. Agurs* is likely.

II. Where the Newly Discovered Evidence Probably Would Have Resulted in Acquittal, the Denial of Relief on the Ground That the New Evidence is "Cumulative" Conflicts With the Tests Announced in *United States v. Agurs,* 427 U. S. 97.

In granting the petitioner's motion for a new trial, the Lexington County court of general sessions found that a reasonable likelihood existed that evidence of the hope of assistance held out to the witness Kilgoar would have affected the verdict in petitioner's second trial.[2] The court of general sessions went on to conclude that not only a possibility, but a **probability,** of acquittal was present.

The South Carolina Supreme Court did not address the trial court's factual finding that petitioner not only possibly but probably would have been acquitted at the second trial if evidence of the witness Kilgoar's hope of leniency had been disclosed in response to the request for that information. Instead of reviewing the trial court's factual findings about the probability of acquittal, the South Carolina Supreme Court simply characterized the newly discovered evidence as cumulative, and therefore necessarily insufficient to support a new trial under the South Carolina rule.

The only information disclosed by the prosecutor prior to the first trial of the petitioner was a disclaimer of any personal interest on his part in prosecuting the witness

[2] Petitioner's first trial had resulted in a hung jury.

Kilgoar. What the prosecutor failed to disclose was that he later informed Kilgoar, prior to petitioner's second trial, that Kilgoar's fate rested not with the prosecutor himself but with the office of the State Attorney General. The prosecutor promised his witness that he would discuss the matter with that office at a later date. When Kilgoar testified against petitioner at the retrial, Kilgoar had been waiting for three months to learn whether the Attorney General's office would follow the prosecutor's lead.

The court below characterized the evidence of this undivulged promise of assistance as "cumulative" to the prosecutor's previous statement that **he personally** had no interest in prosecuting Kilgoar. Since evidence characterized as cumulative is never sufficient to justify a new trial under the South Carolina rule, the South Carolina Supreme Court did not address the trial court's factual finding that the newly discovered evidence would probably have changed the outcome of petitioner's trial.

The court below was plainly in error in describing the newly discovered evidence as cumulative. More importantly, the South Carolina Supreme Court has applied its *per se* rule of procedure regarding motions for a new trial in such a manner as to circumvent the constitutional requirements laid down in *Brady v. Maryland* and similar cases. Instead of examining the impact which the newly discovered evidence might have had upon the jury, *Agurs v. United States*, 427 U. S. 97, the South Carolina Supreme Court held that "cumulative" evidence cannot require a new trial, even where such evidence would probably have resulted in acquittal.

In its Brief to the South Carolina Supreme Court, the State did not dispute the trial court's finding that evidence of the undisclosed hope of leniency would probably have changed the verdict. Instead, the State invited the Court

to characterize the newly discovered promise to the witness Kilgoar as cumulative, and thus irremediable under South Carolina's traditional test of the right to a new trial.

At least one of the Courts of Appeals has recognized that the traditional proscription against granting a new trial on the basis of cumulative evidence cannot be used to thwart the *Brady* rule if the requisite standard of materiality is met by the new evidence. *United States v. Hedgeman*, 564 F. 2d 763 at 769 (7th Cir. 1977). Application of the stringent state restrictions against the grant of a new trial upon after-discovered evidence will continue to undermine the effectiveness of the rule in *Brady* by denying an effective state procedure for vindicating the acknowledged federal due process right, once the undisclosed evidence is brought to light.

CONCLUSION

To decide the extent to which the principles announced in the *Brady* and *Agurs* decisions apply to solely impeaching evidence, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

Appendix A: Opinion of the South Carolina Supreme Court

NESS, A. J.: This consolidated appeal arose from a two-count indictment charging appellants Pender and Caskey with obstruction of justice and conspiracy to obstruct justice. Following a venue change from Lexington to Greenwood County, appellant Pender was convicted on the substantive count of obstruction, but the jury was unable to reach a verdict upon either count as to Caskey, or upon the conspiracy count as to Pender.

Venue was returned to Lexington County and the case was retried on the unresolved counts. The jury returned a guilty verdict on both counts as to Caskey and on the single remaining count as to Pender. Each was sentenced to three years imprisonment. The State appeals from an order granting Pender and Caskey a new trial based on after-discovered evidence. As Pender is now deceased, only Caskey appeals from this order.

We affirm the conviction of Caskey and reverse the order granting a new trial.

The charges against former Lexington County magistrate Pender and Caskey, a Lexington attorney, grew out of a DUI second charge against Virgil Kilgoar which was allegedly dismissed after Kilgoar paid Caskey $800. Initially, Caskey asserts the trial court erred in admitting evidence of his alleged wrong doing in an independent case. This is without merit.

The disputed evidence involved Kilgoar's stepson, Eddie Cox, who was arrested for DUI on a separate occasion and whose charges also were allegedly dropped after the payment of money to Caskey. While evidence of the commission by an accused of another crime is generally inadmissible, one recognized exception to this rule is when the evidence is admitted to show a common scheme. *State v. Conyers,* 268 S. C. 276, 233 S. E. 2d 95 (1977); *State v. Neeley,* 271 S. C. 33, 244 S. E. 2d 522 (1978).

Recently, in *State v. Rivers,* Smith's 4/17/79, Op. No. 20937, this Court quoted approvingly the following language from *State v. Lyle,* 125 S. C. 406, 417, 118 S. E. 803 (1923):

> "Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. **Hence, if the Court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.''** (Emphasis supplied.)

While in Rivers, *supra,* the connection between the two alleged crimes was held to be too tenuous to permit the admission of evidence of the prior alleged incident, here, the two alleged crimes were so closely related as to leave little doubt of the former incident's logical relevancy. Therefore, we conclude the trial court correctly admitted the evidence of another crime to show a common scheme.

Appellant next contends the trial court erred in refusing to direct a verdict of acquittal. This is without merit. Ample evidence of appellant's culpability existed to warrant submission of the case to the jury. See cases collected in 7A West's S. C. Digest, Key No. 741(1). Accordingly, the conviction of Caskey is affirmed.

The State asserts the lower court erred in granting Pender and Caskey's motion for a new trial based on after-discovered evidence. We agree.

While a motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge, it is well settled that it may be granted only if the movant shows that the evidence upon which it is based:

(1) Is such as would probably change the result if a new trial was had;
(2) Has been discovered since the trial;
(3) Could not by the exercise of due diligence have been discovered before the trial;

(4) Is material to the issue of guilt or innocence; and,
(5) Is not merely cumulative or impeaching.

State v. Fowler, 264 S. C. 149, 213 S. E. 2d (1975); *State v. Wells,* 249 S. C. 249, 153 S. E. 2d 904 (1967); *State v. Mayfield,* 235 S. C. 11, 109 S. E. 2d 716, cert. den. 363 U. S. 846, 80 S. Ct. 1616, 4 L. Ed. 2d 1728, reh. den. 364 U. S. 857, 87 S. Ct. 36, 5 L. Ed. 2d 81 (1959); *State v. Clamp,* 225 S. C. 89, 80 S. E. 2d 918 (1954).

Here, the asserted after-discovered evidence was a conversation between the solicitor and Kilgoar whereby Kilgoar was promised immunity or leniency in return for his testimony against Pender and Caskey. The contents of the alleged conversation are practically identical to statements by the solicitor at a pre-trial conference in the Greenwood trial that his office was not pursuing the Kilgoar charge. At that time, Judge Moss found as a matter of fact that no promises of leniency had been made to Kilgoar. Moreover, the alleged after-discovered evidence was at most impeaching of Kilgoar's credibility and not material to appellant's guilt or innocence.

We conclude the lower court committed a manifest abuse of discretion amounting to an error of law in granting the motion for a new trial. We affirm Caskey's conviction and reverse the order granting him a new trial.

Affirmed in part; reversed in part.

LEWIS, C. J., RHODES and GREGORY, JJ. concur. LITTLEJOHN, A. J., not participating.

Appendix B: Order of the Lexington County Court of General Sessions

This matter is before me upon motions by the Defendants, William J. Caskey and Luther W. Pender, for a new trial on the ground of after-discovered evidence. The motion was argued in Lexington on January 27, 1978. Present at this hearing on behalf of the State were Solicitor Donald V. Myers of the Eleventh Judicial Circuit and Assistant Attorney General Robert N. Wells, Jr. Representing the Defendant Caskey were Attorneys Henry H. Taylor, S. Jahue Moore, and James B. Richardson, Jr., and representing the Defendant Pender was Attorney A. J. Dooley.

The defendants in this case were each charged with obstruction of justice and conspiracy. The venue was changed from Lexington County to Greenwood County for trial, which began on July 18, 1977. The jury was unable to reach a verdict on either count as to the Defendant Caskey, or on the conspiracy count as to the Defendant Pender. The latter Defendant was convicted upon the substantive count of obstruction.

The venue of the case was returned to Lexington County, and the case was called for trial a second time on October 31, 1977. The result was a conviction of both Defendants on the conspiracy charge, and of the Defendant Caskey on the substantive count.

Prior to each of the two trials, the Defendants moved to require the State to disclose to them any exculpatory information known to the State, pursuant to the rule of *Brady v. Maryland,* 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, and similar cases. When the motion was renewed before Judge Price, who presided at the second trial, the transcript shows that Judge Price remarked that such disclosure was a continuing duty of the prosecution and declined to inquire further into the matter on that basis. It is the prosecution's failure to disclose the content of a conversation between the Solicitor and the State's key witness which gave rise to the present motion for new trial.

On January 5, 1978, about two months after the Lexington trial, one of the attorneys for the Defendant Caskey, namely, Mr. Taylor, was discussing this case, among other

matters, with Mr. Myers, the Solicitor. Mr. Taylor asked Solicitor Myers whether he intended to prosecute one Virgil Kilgoar for obstruction of justice or for driving under the influence, second offense, the charge from which the instant prosecution of the Defendants Caskey and Pender arose. The Solicitor replied that he himself would not go forward with such a prosecution against Kilgoar; that if it were done, it would have to be done by the Attorney General's office. When asked whether this had been told to Kilgoar prior to his testifying against the Defendants, the Solicitor acknowledged that it had. It seems that the Solicitor had told Mr. Kilgoar in Greenwood, while the jury was deliberating its verdict at the first trial, that he, Kilgoar, probably would not be prosecuted, but that the Solicitor would have to take up the matter with the Attorney General. It is the contention of the Defendants in their motion for a new trial that they were entitled to know of this communication prior to the second trial of the case because it held out the hope of leniency to Kilgoar so long as his cooperation continued.

The facts, above stated, are undisputed, and that is so because of the commendable candor and frankness which the able Solicitor has displayed in the argument of this matter.

In its Return to the Defendants' motion, the State contends that the Defendants have failed to meet the five traditional tests of the sufficiency of a motion for new trial on after-discovered evidence. As set forth in *State v. Fowler,* 264 S. C. 149, 213 S. E. 2d 447, these usual criteria are that the newly discovered evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.

There is no question that the five tests relied upon by the State are applicable in the usual case. However, the after-discovered evidence in this matter is of a special kind, and has been treated in an exceptional way by our Supreme Court and by the courts of other jurisdictions as well. The

case of *State v. Bethune,* 104 S. C. 353, 89 S. E. 153, shows that the five-fold test, and particularly the fifth element mentioned above, is not rigidly applied when the new evidence was known to the prosecution but not to the defendant. In the *Bethune* case, an assistant Solicitor knew that the testimony of a prosecution witness was at variance with a previous oral statement of the witness. This fact was not disclosed until after the trial was over. The defendant's motion for a new trial on the ground of after-discovered evidence was denied by the circuit court, but the Supreme Court reversed. The Court stated:

> "The theory of the law is that the duties of the Solicitor are *quasi* Judicial, and that, while it is more especially made his duty to conduct the prosecution so as to present the facts upon which the State seeks a conviction, nevertheless the duty rests upon him to see that no act on his part shall prevent the prisoner from having a fair and impartial trial. * * * When the assistant Solicitor heard the witness McFadden testify differently, from the statements which he had already made, it was his duty to bring such facts to the attention of the Solicitor in order that he might take such steps as might be necessary to enable the prisoner to have a fair trial."

The evidence upon which the Supreme Court held that a new trial was necessary was impeaching evidence. But it was not *merely* impeaching, within the meaning of the rule relied upon by the State herein. Rather, it was evidence useful to the defense, known to the prosecution, but unknown to the defendant.

One of the cases handed up to me at the argument of the motion holds that the federal constitutional rule in situations of this kind is much like the rule applied in *State v. Bethune.* In the case of *Giglio v. United States,* 405 U. S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104, the prosecution's key witness had testified at trial that he had been promised nothing in exchange for his testimony. The assistant U. S. Attorney acknowledged after the trial that he had promised not to prosecute the witness in exchange

for his testimony. The U. S. Attorney who actually handled the prosecution stated, however, that he had only told the witness that he would have to rely upon the good conscience of the government for his protection if he cooperated. As to the latter representation, the Supreme Court found that it "contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency." 92. S. Ct. at page 765, footnote No. 4. As to the fact that the newly discovered evidence was only impeaching, it was stated:

> "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general rule." *Giglio v. United States, supra,* quoting from *Napue v. Illinois,* 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217.

So far as the witness Kilgoar knew when he took the stand at Lexington, the decision as to whether he himself would be prosecuted for an offense which would cost him at least his drivers license and probably his livelihood, was yet to be taken up on his behalf with the Attorney General of South Carolina by the Solicitor of the Eleventh Judicial Circuit. When questioned on direct examination as to whether he had been promised any hope of leniency in exchange for his testimony, Kilgoar replied in the negative. The State now argues that the witness' response was literally accurate, that no formal promise or deal had been made, and that that concludes the matter. But the witness had been told, two months earlier, that the decision to prosecute or not had not yet been made; that it lay in the hands of the Attorney General; that the Solicitor would take up the matter with him, the clear inference being that the Solicitor would advocate Kilgoar's cause and urge the same favorable decision by the Attorney General which the Solicitor himself had tentatively made. So far as the witness knew, the decision as to what to do with him had still not been made, though ample time had passed in which to resolve the matter. I am convinced that a jury would infer,

as I have, that the witness was bound to suspect that his own fate, to be decided at a conference in which he hoped the Solicitor would plead his cause, might depend upon his testimony upon the stand. Under these circumstances I conclude, and so find, that the Solicitor's communication to the witness, though not intended to create a hope of leniency when made, acquired that effect in the light of later events. In the light of those events, it became the obligation of the State to disclose the event in question, and the Solicitor's good faith in this matter, though unquestioned, is immaterial. *Giglio v. United States, supra.*

The State also contends that a new trial is not warranted unless the after-discovered evidence is such as would probably have changed the outcome of the trial. The rule is not so strict in this particular situation, where "any reasonable likelihood" that the verdict was affected is enough to require relief. *Napue v. Illinois, supra.* Even under the stricter standard, however, I believe and so find that the outcome would probably have differed if the jury had known of the impending conference at which the prosecution of the key witness would, as he then knew, be determined. See: *Miller v. Pate,* 386 U. S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690. All the requirements for a new trial are met here.

I again commend the Solicitor for his candor and unquestioned integrity. It is plain from his argument against the motion that he places a strict interpretation upon the rule requiring disclosure of impeaching evidence, and that he conceives the rule to apply only to more-or-less formal grants of immunity. In the light of the *State v. Bethune* case and the federal authorities cited in this order, however, I am unable to agree. It is my belief that the true rule is broader, and extends to the present facts.

For the foregoing reasons,

IT IS ORDERED that the Defendants' respective motions for a new trial be, and they hereby are, granted.

/s/ GEORGE BELL TIMMERMAN, JR.,
Resident Judge, 11th Judicial Circuit.

Lexington, South Carolina,
March 10, 1978.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported in the Advance Sheets for the South Carolina Supreme Court published during the week of June 16, 1979, Opinion Number 20982.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Is the South Carolina Supreme Court's decision in the instant case in conflict with the decisions of the courts of appeals in cases involving solely impeaching evidence?

II.

Would the asserted after-discovered evidence result in acquittal if a new trial was had?

ARGUMENT

The State of South Carolina, in opposition to the Petition for Writ of Certiorari in this matter, respectfully submits the following:

Petitioner's submitted reasons for allowance of the Writ of Certiorari are without merit.

I.

The South Carolina Supreme Court

unquestioningly found that the asserted after-discovered evidence in the instant case was not only merely impeaching and cumulative, but also not material to Petitioner's guilt or innocence and would not have changed the result if a new trial was had.

Petitioner claims, without merit we contend, that "the South Carolina Supreme Court did not address the trial court's factual finding that Petitioner not only possibly but probably would have been acquitted at the second trial if evidence of the witness Kilgoar's hope of leniency had been disclosed in response to the request for that information." Respondent respectfully submits that this contention is patently frivolous.

In fact, the Court specifically found:

> Here, the asserted after-discovered evidence was a conversation between the solicitor and Kilgoar whereby Kilgoar was promised immunity or leniency in return for his testimony against Pender and Caskey.

The contents of the alleged conversation are practically identical to statements by the solicitor at a pre-trial conference in the Greenwood trial that his office was not pursuing the Kilgoar charge. At that time, Judge Moss found as a matter of fact that no promises of leniency had been made to Kilgoar. Moreover, the alleged after-discovered evidence was at most impeaching of Kilgoar's credibility and not material to Appellant's guilt or innocence. We conclude the lower court committed a manifest abuse of discretion amounting to an error of law in granting the motion for a new trial.

Hence, in defiance of Petitioner's contention otherwise, the South Carolina Supreme Court did in fact review the lower court's finding that this asserted after-discovered evidence would have probably changed the result if a new trial was had, finding said ruling to be a manifest abuse of discretion. Not only was said evidence merely impeaching and cumulative, these factors being inherently reflective in and

of themselves as to impact of the testimony as after-discovered evidence, but it was immaterial to the guilt or innocence of the Petitioner. By such findings, the South Carolina Supreme Court has conclusively found that said evidence would not change the result if a new trial was had.

Respondent respectfully submits that Petitioner has set forth absolutely no basis justifying allowance by this Court of a Writ of Certiorari. Hence, we respectfully submit said Petition is utterly without merit and should be dismissed.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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